

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Standing Operating Procedure (SOP), Mitigation Policy for Issuing Real Estate Outgrants

1. Purpose. This SOP prescribes guidelines, policies, and procedures for determining mitigation in connection with processing requests for the use of Government-owned properties within the Nashville District, Civil Works Program, Nashville, Tennessee.

This policy requires that all proposals to use Corps lands be evaluated in the following sequence - avoidance of Corps land, minimization of potential impacts upon Corps lands, and mitigation for resource impacts.

2. Applicability. This policy is applicable to all requests for real estate outgrants in the Nashville District, except for minor shoreline licenses. Regulatory mitigation requirements are unaffected by this document. The Tennessee Wildlife Resources Foundation's proposed in-lieu-fee stream mitigation program within the State of Tennessee does not meet the mitigation requirements set forth in this SOP.

3. References.

a. AR 200-1, Environmental Quality, Environmental Protection and Enhancement, 21 Feb 97.

b. AR 200-3, Natural Resources - Land, Forest, and Wildlife Management, 28 Feb 95.

c. AR 405-80, Management of Title and Granting Use of Real Property, 10 Oct 97.

d. EM 1110-2-1204, Chapter 8, Mitigation Decision Analysis.

e. ER 200-2-2, Procedures for Implementing NEPA, Mar 88.

f. ER 405-1-12, Real Estate Handbook, 20 Nov 85.

g. ER 1130-2-540, Natural Resources Stewardship, 15 Nov 96.

h. ER 1165-2-26, Water Resources Policies and Authorities, Implementation of Executive Order 11988 on Flood Plain Management.

i. Section 10 of the Rivers and Harbors Act of 1899.

CELRN-OP-R (1130)

SUBJECT: Standing Operating Procedure (SOP), Mitigation Policy
for Issuing Real Estate Outgrants

j. Section 404 of the Clean Water Act, as amended, 33 U.S.C. 1344.

k. National Environmental Policy Act, 1969, (NEPA), as amended, 42 U.S.C. 4321 et seq.

l. Fish and Wildlife Coordination Act, 1958, (FWCA), 16 U.S.C. 661 et seq.

m. National Historic Preservation Act, 1966, (NHPA), as amended, 16 U.S.C. 470 et seq.

n. Endangered Species Act, 1973, as amended, 16 U.S.C. 1531 et seq.

o. Comprehensive Environmental Response, Compensation and Liability Act, (CERCLA), of 1980, as amended, (42 U.S.C. 9601).

p. Forest Management, Public Law 86-717.

q. Nashville District Guidelines and Policy for the Review of Cut and Fill Proposals at Corps of Engineers Lakes, Draft dated Aug 01.

r. Nashville District Standing Operating Procedures (SOP), Processing Major Outgrants, dated Nov 98

s. Project Master Plans and Supplements.

4. Definition of Mitigation. For purposes of the major environmental statutes, mitigation is defined as actions that reduce the severity or intensity of adverse impacts of other actions, to include:

a. Avoiding the impact by not taking a certain action or parts of an action or by moving the project location. Action proponents are encouraged to consider avoidance as the preferred mitigation measure.

b. Minimizing impacts by limiting the degree or magnitude of the action and its implementation, for example, by adjusting site layout.

c. Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

CELRN-OP-R (1130)

SUBJECT: Standing Operating Procedure (SOP), Mitigation Policy
for Issuing Real Estate Outgrants

d. Reducing or eliminating the impact over time by monitoring, maintaining, and/or replacing equipment or structures to prevent future environmental degradation from equipment or structural failure over the life of the action.

e. Compensating for the impact by replacing or providing substitute resources or environments. (With the exception of unique habitats under imminent threat of destruction, a mere change in ownership of existing habitat is generally not considered mitigation. Habitat improvement must be implemented in addition to long-term protection of the habitat).

Mitigation requirements vary somewhat under the environmental laws, regulations, and executive orders. Discussions of these varying requirements are available in the enclosed Appendix A.

For purposes of this SOP, the definition of mitigation is broadened to include "all measures necessary to make the Corps project whole". Thus, mitigation beyond or outside that required solely for compliance with environmental laws, regulations, and executive orders may be required (i.e. replacement of recreational resources).

5. Objectives. The policies in this SOP are designed to develop, initiate, maintain, protect, and improve the environmental qualities, cultural resources, aesthetic values, ecological relationships, and recreation facilities at Nashville District Civil Works projects by:

a. Protection of real estate investment from depreciation.

b. Compliance with environmental protection and enhancement statutes, regulations, policies and procedures as outlined in paragraph 3.

c. Protection of environmentally sensitive resources, such as: flood plains, wetlands, creeks, steep slopes, aquifer recharge zones, riparian zones, wildlife habitat, water quality, and natural areas.

d. Prevention of damage and destruction of natural and cultural resources from the development of the property.

e. Protection and improvement of the natural beauty of the landscape.

CELRN-OP-R (1130)

SUBJECT: Standing Operating Procedure (SOP), Mitigation Policy
for Issuing Real Estate Outgrants

f. Ensuring the project impacted is returned to a "whole" condition, i.e., to fulfill stewardship responsibility to sustain healthy ecosystems and biodiversity, and to ensure resources are available for present and future generations.

g. Preventing authorization of activities contrary to the project's Master Plan land-use designations.

h. Preventing damage and destruction of facilities.

6. General. The Resource Manager (RM) is the initial contact point for the applicant and must make the initial determination on the availability of public lands and waters for proposed uses. Subject to the limitations stated herein, the RM may deny applications (i.e. by declining to make land available or disapproving of development plans) that do not conform to Corps policies, plans, or programs; that cause unacceptable environmental or cultural resource impacts; or that conflict with overall public use of the project. This decision will be final after coordination with, and agreement by, the Chief, Operations Division (OP) and other District elements, such as the Chief, Real Estate Division (RE), as required by policies and regulations. In situations where the Chief, OP makes a determination that land will not be made available for a requested activity, OP will inform RE of this determination. It is the Nashville District's goal to avoid impacts to Corps lands when practicable alternatives are available to the applicant. This is consistent with ER 405-1-12, Real Estate Handbook, Chapter 8. However, only the District Engineer (DE), and those to whom the DE has delegated authority, may deny applications for activities requiring approval under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899.

7. Determination of Mitigation Requirement. A Mitigation Determination team comprised of the following individuals will make decisions on when, and to what extent, mitigation will be required for a real estate outgrant:

Field Project Representative
OP-R Representative
RE-M Action Officer
PM-P Principal Preparer of NEPA Documents
OP-F Project Manager (if DA Permit required)

During the NEPA process, PM-P will lead negotiations of the mitigation plan and lead the public review process until there is an agreement in principal. RE, in cooperation with OP, will lead

CELNRN-OP-R (1130)

SUBJECT: Standing Operating Procedure (SOP), Mitigation Policy
for Issuing Real Estate Outgrants

negotiations of the mitigation plan when Corps owned "real property" such as buildings, recreation facilities, or other improvements is impacted. Once a corporate decision concerning the mitigation required is made, RE is responsible for negotiating the final terms and conditions of the outgrant document. If these negotiations entail modifications/changes to this agreement in principal, the Mitigation Determination team mentioned above will be requested to assist in the negotiation process prior to the issuance of any outgrant document.

Coordination of mitigation issues will be made with the following offices, as appropriate: OP, PM, RE, OC, and EC. Coordination may also be required with other federal agencies, such as the Department of the Interior (DOI), the Environmental Protection Agency (EPA), etc. as well as with various state agencies. In the event there is a disagreement between the Corps and another federal or non-federal agency regarding application of mitigation requirements, the ultimate decision rests with the Corps. This responsibility includes ensuring that decisions are made in compliance with all applicable laws and regulations. Once a real estate outgrant is issued, responsibility for administering outgrants rests with RE.

8. Non-Statutory Mitigation. Under certain circumstances, impacts may be caused to the resource base which are not addressed under existing authorities. As an example, a proposal that is categorically excluded from NEPA documentation may result in the destruction of a small wooded area containing twenty trees. There are no threatened or endangered species or any wetlands involved with the action so Section 10/404, or other requirements do not apply, even though there is minimal damage to the resource base. Another instance may entail the destruction of 20 campsites resulting from a road expansion. No specific statute addresses these actions, yet damages are incurred and appropriate mitigation should be provided. The applicant for the outgrant can be advised of the impact and mitigation required.

9. Real Estate Outgrant Documentation. Where mitigation is required on a real estate outgrant, it will be addressed as a condition to the instrument. In addition, the outgrant agreement will reference those uses that are restricted under federal, state, regional, or local statutes. A copy of the mitigation agreement, use restrictions, and/or Memorandum of Agreement (MOA) will be included as an attachment to the outgrant document. If a grantee is not in compliance with the mitigation requirements, it is a violation of the outgrant document and the appropriate action(s) may be taken in accordance with the terms and

CELRN-OP-R (1130)

SUBJECT: Standing Operating Procedure (SOP), Mitigation Policy for Issuing Real Estate Outgrants

conditions of the outgrant agreement. In addition, action may also be required under the specific statute(s) that required the mitigation. The applicant must provide evidence of financial capability with assurances of the ability to comply with both current and long-term mitigation requirements. A clear timetable must also be provided if mitigation requirements extend beyond the execution date of the outgrant agreement. Coordination with the office(s) which are responsible for these requirements must be completed to ensure the requirements are in place before the outgrant document is executed.

10. Waiver of Mitigation Requirements. When only "Non-Statutory Mitigation", as defined in paragraph 8, is required, the Corps may choose to waive this mitigation requirement in cases where the requested activity will further an authorized project purpose and meet a public demand that the Corps is unable to meet. However, the Corps does not have the authority to waive mitigation requirements when such mitigation is required by a law, regulation, or statute. In special, unusual circumstances, the Corps may choose to assume responsibility for these damages and complete the required mitigation measures for the outgrantee as funding allows. Before assuming this responsibility, the action must be thoroughly coordinated with OC, RE, PM-P, and OP, since such an action could, in effect, be illegally committing the Secretary of the Army (SA) to unauthorized future expenditures.

11. Responsibility for Expenses. In most cases, all costs associated with processing the mitigation aspect of the outgrant and initiating and maintaining mitigation requirements over the life of the mitigation action are the responsibility of the outgrant applicant and will be agreed upon in the real estate outgrant instrument. These costs are in addition to the fair market value rent, if applicable, of the property to be outgranted and any other purely administrative expenses incurred as a result of this outgrant request.

12. Application of Most Stringent Requirements. The most stringent mitigation requirements will be applied to real estate outgrants, whether those requirements are contained within federal, state, local, regional, or other laws, statutes, policies, regulations, or procedures.

13. Future Ownership and Management of Mitigation Properties. On-site mitigation should be achieved wherever possible. If on-site mitigation is not possible, off-site mitigation should be undertaken, as follows:

CELRN-OP-R (1130)

SUBJECT: Standing Operating Procedure (SOP), Mitigation Policy
for Issuing Real Estate Outgrants

a. Acquisition of Real Property. To the maximum extent possible, any additional lands or other real property interest required to be purchased by the applicant because of damages resulting from a real estate outgrant will be vested or transferred to other federal, state, local, or regional agencies who are capable of managing such properties in perpetuity, particularly where such lands are not contiguous with existing project lands or waters. In no instance will the Corps take title or any other form of interest to property prior to receiving approval from headquarters. As required by Chapter 3 of ER 405-1-12, REPR documentation required to support the recommendation for taking title to this property will also address the following information:

(1) Justification as to why Corps ownership of the property is required, as opposed to ownership or management by other federal, state, local, or regional agencies.

(2) Cost to the Corps to operate and maintain (O&M) this property during the time of Corps ownership and whether current district O&M definitions and accounts would support this new activity. To the extent possible, if title will be taken to real property as a result of a mitigation outgrant, the property should generally be contiguous to other Corps properties in the area. The deed would need to reflect any ongoing mitigation requirements and an MOA may be required to specify who would administer the mitigation requirements.

b. Personal Property. Title may be taken to personal property received as a result of an outgrant mitigation action such as riprapping, planting of trees and vegetation, or other similar properties. Prior to the receipt of any structures (buildings, etc.) as a result of mitigation action, approval to accept these structures must first be provided from HQUSACE. A formal or informal appraisal will also be required for real property accountability purposes and property accountability records will need to be updated to reflect the new facilities.

c. Other Property. In the absence of specific authority, the Corps may not accept cash in lieu of mitigation services. In some limited instances, however, it is possible to enter into agreements with states or others to directly perform the mitigation work and then to be reimbursed by the state or others for such work. Approval from the Assistant Secretary of the Army for Civil Works (ASA) may be necessary prior to entering into such an agreement. There is no prohibition of cash payments from

CELRN-OP-R (1130)

SUBJECT: Standing Operating Procedure (SOP), Mitigation Policy
for Issuing Real Estate Outgrants

the applicant to other entities that agree to assume mitigation obligations. Such payments should, however, first be coordinated with RM, RE, OC, and HQUSACE.

d. In-Kind vs. Out-of-Kind Consideration. In most instances, "in-kind" consideration for mitigation impacts is appropriate (i.e., three acres of existing wildlife habitat destroyed and replaced with three or more acres of new wildlife habitat lands). This type of mitigation generally consists of restoration, creation, or improvement to offset the damaged resource base. In other circumstances, it may be more appropriate to accept "out-of-kind" consideration (i.e., three acres of existing wildlife habitat destroyed and mitigated by riprapping 1,000 linear feet of shoreline to protect nearby wildlife habitat). Entering into agreements for replacement of the hypothetical three acres of damaged wildlife habitat for recreation facilities is not appropriate. As an administrative note, mitigation ratios (1:1, 1:3, etc.) are generally raised or lowered to account for the degree of loss incurred as a result of the outgrant.

e. MOA's or Other Agreements. If appropriate, the district should attempt to negotiate a MOA with state, regional, local, or other federal agencies to take over management of any properties identified for acquisition as a result of outgrant mitigation requirements. Any MOA that obligates the SA for future commitments or expenditures requires prior HQUSACE approval.

14. Compliance or Other Inspections and Monitoring. Periodic compliance inspections are required under ER 405-1-12, Chapter 8. Outgrants requiring mitigation will be inspected to ensure compliance with the mitigation requirements. Several statutes require annual reporting and monitoring on the status of the mitigation. Realty Specialists must be familiar with the requirements of the statute(s) under which the compensatory mitigation is performed. The cost of these inspections and reviews should be included when calculating the administrative cost associated with issuing the outgrant document.

15. Responsibilities.

Part I. (Field Projects)

a. This policy requires that all proposals to use Corps lands be evaluated in the following sequence - avoidance of Corps land as the first option, minimization of potential impacts upon Corps lands, and mitigation for unavoidable resource impacts.

CELRN-OP-R (1130)

SUBJECT: Standing Operating Procedure (SOP), Mitigation Policy for Issuing Real Estate Outgrants

b. The RM's first step in the sequencing process is to assess whether the proposal could avoid use of public property and resources altogether. Public lands shall not be made available if there are practicable alternatives available to the applicant that would avoid impacting public lands. An alternative is practicable if it is available and capable of being done after taking into consideration economic factors, existing technology, and logistics in light of overall project purposes. It will be the responsibility of the applicant to demonstrate that no practicable alternatives are available, i.e. socio-economics, the unavailability of private lands, etc. Note that this does not preclude the ability to refuse inappropriate activities, regardless of the availability or unavailability of practicable alternatives for performing that activity.

c. The second step in the sequencing process is to minimize impacts to public lands where the proposed use is unavoidable. Minimization shall be considered only after it has been determined that no practicable alternatives to an appropriate activity are available to the applicant. Actions to minimize impacts would include such alternatives as moving the proposed work to another location that would impact less public land, moving to previously disturbed sites on Corps land, such as existing utility corridors that have low ecological or environmental value, reducing the scope and size of the proposal (such as reducing corridor width), and/or requiring special conditions to be included with any permit approval that would reduce resource impacts.

d. If the RM has determined that the proposed activity is appropriate and consistent with project purposes, no practicable alternatives to the use of public land are available, and that the proposed activities have been designed to minimize resource impacts to the extent possible, he/she may then make a determination that public lands are available.

e. If, at this point, the applicant chooses to submit a formal application, the RM will complete an Environmental Outgrant Evaluation (ORN Form 463) and a Report of Availability (ROA), describing any known environmental concerns and site-specific conditions or requirements. The processing of the outgrant will proceed far more expeditiously if relevant impacts and environmental conditions are thoroughly described. The RM should also include any recommendations concerning the need for mitigation (if any). If mitigation is recommended, the RM may suggest potential mitigation measures. Mapping, computer generated mapping disks from the applicant for use in the

CELRN-OP-R (1130)

SUBJECT: Standing Operating Procedure (SOP), Mitigation Policy for Issuing Real Estate Outgrants

District CADD system (when available), real estate tract numbers, site specific conditions, written requests from applicants, list of existing outgrants affected, any known Hazardous, Toxic, Radiological Wastes (HTRW) issues, etc. will be included in the application transmittal forwarded to OP-R for District Office review and coordination.

Part II. (District Coordination)

a. OP-R will review the package and forward to RE-M for overall coordination and actions required to process the outgrant. OP-R will supplement or modify the project's Master Plan in cases where the requested activity is not authorized by the Master Plan but the proposal is supported. OP-R will ensure the application is thorough and comprehensive to include an ORN Form 463 and mapping which depicts all affected tract numbers, etc. for review, coordination, and outgrant purposes.

b. RE-M will transmit proposals for routine outgrants to District elements for action with suspense dates. If the application is complicated or controversial, a meeting will be conducted to establish specific responsibilities on issues and suspense dates for resolution. This should prevent duplication or the public receiving contradictory comments or positions from the Corps. RE-M will prepare the outgrant instrument, the exhibit map(s), appraisal (if necessary), begin Environmental Baseline Studies (EBS), if applicable, other exhibits as needed, prepare mapping, and assemble the outgrant package to the extent possible while other elements are completing required reviews and approvals. Upon completion of these reviews, RE-M will incorporate the findings of the reviews as appropriate and complete the outgrant package assembly.

c. OP-F will determine if DA permits are required and, if so, complete the necessary reviews and public notices required for a DA permit in communication with PM-P on environmental and cultural resources issues and RE-M on real estate issues. As outlined in the SOP for Processing Major Outgrants (reference 3. m.), joint NEPA documentation will be prepared by OP-F and PM-P when both a DA permit and Real Estate Instrument are required. OP-F will provide the regulatory permit(s) to RE-M to be sent simultaneously under the same transmittal to applicants.

d. PM-P will determine if the action is categorically excluded and non-controversial under NEPA guidelines. It will prepare the required environmental documents, if any, and

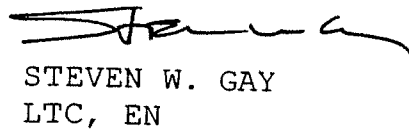
CELRN-OP-R (1130)

SUBJECT: Standing Operating Procedure (SOP), Mitigation Policy
for Issuing Real Estate Outgrants

complete a Report of Availability after completion of environmental and cultural resources assessments. When appropriate, the applicant will be informed of these needs and schedules and offered the option of either assuming responsibility for preparing them, subject to Corps' specifications or providing funding for the Corps to prepare the required documentation. During the NEPA process, PM-P will lead negotiation of the mitigation plan until there is an agreement in principal. PM-P will provide the PM response to RE-M.

e. EP-H will review applications for compliance with the District's cut and fill policies on project lands and flowage easements, particularly with regard to the effects on flood storage and the environment.

16. POC for questions pertaining to mitigation should be directed to Maurice Simpson, Team Leader, Land and Water Conservation Section, OP-R-C, at extension 7807.


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